

CHRISTOPHER J. BORDERS (CA SBN 135901)
cborders@hinshawlaw.com
HINSHAW & CULBERTSON LLP
One California Street, 18th Floor
San Francisco, California 94111
Telephone: 415-362-6000

Attorney for Defendants
TERMINIX INTERNATIONAL, INC.,
THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP
(erroneously sued herein as The Terminix International Company),
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES, and
SERVICEMASTER CONSUMER SERVICES LIMITED PARTNERSHIP

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BARBARA NEU on behalf of herself and all
others similarly situated,

Plaintiff,

vs.

TERMINIX INTERNATIONAL, INC., THE
TERMINIX INTERNATIONAL COMPANY,
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES,
SERVICEMASTER CONSUMER SERVICES
LIMITED PARTNERSHIP,

Defendants.

Case No.: C 07-06472-CW
**JOINT CASE MANAGEMENT
STATEMENT AND PROPOSED ORDER**

Hon. Claudia Wilken

Complaint Filed: December 27, 2007

Date: April 10, 2008
Time: 2:00 p.m.
Courtroom: 2

1 Plaintiff, BARBARA NEU, together with Defendants, TERMINIX INTERNATIONAL,
2 INC., THE TERMINIX INTERNATIONAL COMPANY LIMITED PARTNERSHIP, THE
3 SERVICEMASTER COMPANY, SERVICEMASTER CONSUMER SERVICES, INC., and
4 SERVICEMASTER CONSUMER SERVICES LIMITED PARTNERSHIP, by and through the
5 undersigned attorneys, hereby submit this Joint Case Management Statement and Proposed
6 Order pursuant to Civil Local Rule 16-9, and respectfully request the Court adopt it as its Case
7 Management Order in this case.

8 **1. Jurisdiction And Service**

9 Plaintiff alleges that the Court has subject matter jurisdiction pursuant to the Class Action
10 Fairness Act, 28 U.S.C. § 1332(d). Defendants acknowledge that the minimal diversity
11 requirements of CAFA are satisfied. With respect to the amount in controversy, Plaintiff's
12 Complaint asserts that the aggregate amount in controversy exceeds \$5 million, exclusive of
13 interest and costs. Defendants dispute that the amount in controversy exceeds this amount.
14 There is no dispute as to venue and all parties have been served.

15 **2. Facts**

16 *Plaintiff's Statement:* Without limitation of the Complaint, Plaintiffs allege that Terminix
17 engages in widespread unfair, unlawful and deceptive practices (and breaches of duties imposed
18 by contracts, law or industry standards) with regard to how it promotes, sells, and services
19 obligations under contracts dealing with prevention of subterranean (ground) termites.

20
21 Terminix used chemicals it knew wore off over time or which were known to be
22 ineffective even if properly applied but nonetheless promised protection or annually renewed
23 promises. Terminix failed to replace or complete chemical barriers, kept customers in the dark
24 about this failure, and covered up or compounded the wrongdoing by switching these customers
25 to different contracts, or provided spot treatments which it said were "complete" treatments.
26 Terminix either continued to collect annual renewal premiums for its guarantees or switched
27 customers to new contracts for installation of control systems it falsely and deceptively described
28

1 as "baits" that would kill all termite colonies. The system it described as a "baiting system" could
2 not fairly or accurately be considered a lure for termites and even if it could, Terminix did not
3 use it appropriately and knew that it was not effective as it now admits in published materials
4 and solicitations.

5 Terminix failed to inspect properties with the frequency or thoroughness that it knew to
6 be required by sound entomologic practices (and even its own policies) without disclosing to
7 customers that its non-existent or incomplete inspections failed to include a quality control
8 program and were not designed to identify problems with the completeness or effectiveness of
9 chemical barriers or control methodologies.
10

11 Plaintiffs incorporate the full breath of claims in the complaint into this summary.

12
13 *Defendants' Statement:* The Plaintiff did not attach a contract to the Complaint and has
14 not properly pled an individual claim. Moreover, if the Plaintiff can show that she had an
15 agreement with Terminix, then that agreement may very well contain a mandatory binding
16 arbitration provision. Further, Plaintiff's Complaint seeks to assert claims on behalf of a class
17 and she requests that the trier of fact review almost every aspect of Terminix's work at thousands
18 of properties throughout California over an unspecified multi-year period. The Complaint
19 alleges misconduct involving virtually every aspect of Terminix's subterranean termite business
20 including purported oral and written representations made to customers, inspection and
21 reinspection practices, efficacy of termiticides, and quality of treatment and retreatment.
22 Terminix and ServiceMaster deny any misconduct to Plaintiff and the putative class they seek to
23 represent.

24 **3. Legal Issues**

25 *Plaintiff's Statement:* The Defendants have not answered the complaint. Based on the
26 Defendants' Motion to Dismiss and the Complaint, it is Plaintiff's belief that the following will
27 be at issue: Liability individually and on a class basis for each of the causes of action alleged in
28 the complaint; the extent of control and direction of the Terminix entities, its business, and its

1 finances, assets, and liabilities by the ServiceMaster entities; the appropriate class definition and
2 whether a class should be certified; scope and applicability of contract claims; scope and
3 applicability of the “economic loss rule” for non-contract claims; and, scope and availability of
4 equitable relief.

5 *Defendants’ Statement:* There are numerous legal issues relating to the merits of the
6 case, including the issue of whether the Plaintiff has standing to sue. The Plaintiff did not attach
7 a contract to the Complaint and has not properly pled an individual claim. As set forth more
8 fully in the Defendants’ Motion to Dismiss, the contract and warranty claims are insufficiently
9 pled, the negligence claims are barred by the economic loss doctrine, the Complaint contains
10 duplicative counts, the claims under the Unfair Competition Law and Consumer Legal Remedies
11 Act lack the required specificity, and the Complaint does not properly state any viable causes of
12 action against the ServiceMaster defendants. Moreover, if the Plaintiff can show that she had an
13 agreement with Terminix, then that agreement may very well contain a mandatory binding
14 arbitration provision.

15 The Plaintiff, in addition to pursuing her own claim, seeks to assert claims on behalf of a
16 class. Even if the Plaintiff can demonstrate that she has standing, and even if the Plaintiff can
17 state a legally viable individual claim, it is Defendants’ position that the requested class is not
18 certifiable pursuant to Fed. R. Civ. P. 23 because individual issues predominate and a class
19 action would not be a superior method for resolving individual claims. There is no common
20 body of evidence that could be used to try the claims of potentially thousands of class members
21 who all have unique homes, contracts and issues. Cases involving termite services and damages
22 are by their nature highly individualized and therefore, are inappropriate for class treatment.
23 Every structure is unique and the services provided by Terminix are customer-specific.
24 Likewise, the service provided, nature of any termite damage, cause of termite damage, and
25 timing of termite damage are highly individualized issues. In addition to the facts of these cases
26 being customer- and property-specific, the causes of action asserted in such cases require highly
27 individualized factual and legal determinations. Due to their inherently individualized nature,
28

1 courts have never certified any termite damage case as a class action. *See, e.g., Rollins, Inc. v.*
2 *Warren*, 653 S.E.2d 794 (Ga. App. 2007); *Rollins, Inc. v. Butland*, 951 So.2d 860 (Fla. App.
3 2006); *Garrett v. Rollins, Inc.*, Case No. 11 181 00163 04 (Decided July 14, 2006).

4 **4. Motions**

5 Defendants have filed a Motion to Dismiss. The Motion has been fully briefed and is
6 scheduled for hearing on April 10, 2008. No other motions are currently pending. The parties
7 anticipate the plaintiff will file a motion for class certification (discussed more fully in Section
8 17 below). Also, the parties anticipate that other motions may be filed by both parties based on
9 the court's rulings and how the litigation progresses.

10 **5. Amendment Of Pleadings**

11 The parties do not currently anticipate the addition of any parties.

12 **6. Evidence Preservation**

13 *Plaintiff's Statement:* Counsel advised the individual Plaintiffs of their duty to preserve
14 evidence and copies of discoverable materials have been copied.

15 *Defendants' Statement:* Defendants have distributed a document preservation notice to
16 their representatives requiring the preservation of documents (both paper documents and
17 electronically stored information) that relate to the subject matter of this litigation.

18 **7. Disclosures**

19 The parties will make Rule 26(a)(1) initial disclosures relating to the individual claims of
20 the named plaintiff by April 9, 2008, which is 14 days from the parties' Rule 26(f) conference
21 held on March 26, 2008.

22 **8. Discovery**

23 *Plaintiff's Statement:*

24 Discovery should not be bifurcated. As with many cases where predominance is going to
25 be contested, if discovery is bifurcated, there will be many disputes over whether discovery is
26 merits based or class based. Therefore, bifurcated discovery will only serve to delay this cause,
27 repeat efforts, and cause unnecessary expense on all parties.
28

1 No discovery has been taken to date. Initial disclosures have not yet been made.
 2 Defendants would like Plaintiff to present prima facie evidence showing that class action
 3 requirements are satisfied without the benefit of discovery. Discovery is needed in order for the
 4 Plaintiff to support its class action allegations and in order to meet the Rule 23 requirements. If
 5 Plaintiffs were to proceed without discovery evidence, Plaintiffs would be at an unfair
 6 disadvantage, not contemplated by the Rules.

7
 8 Plaintiffs request that each side be allowed up to 20 fact depositions, 10 depositions of
 9 retained experts, and 100 interrogatories without leave of court.

10 Discovery and pretrial deadlines should be as follows:

11 Plaintiffs' disclosure of experts: 9/25/08

12 Plaintiffs' Expert Depositions: 10/31/08

13 Defendants' disclosure of experts: 10/31/08

14 Close of expert discovery: 11/30/08

15 Preliminary Discovery Completion: 12/30/08

16 Class Certification Motion: 01/15/09

17 Opposition to Class Motion: 02/15/09

18 Reply to Opposition: 03/01/09

19 *Defendants' Statement:*

20 The Defendants should not be required to incur significant litigation expenses
 21 participating in extensive discovery regarding class certification issues in light of the inherently
 22 individualized nature of these cases and the fact that courts have never certified any termite
 23 damage case as a class action. *See, e.g., Rollins, Inc. v. Warren*, 653 S.E.2d 794 (Ga. App.
 24 2007); *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. App. 2006); *Garrett v. Rollins, Inc.*,
 25 American Arbitration Association Case No. 11 181 00163 04 (Decided July 14, 2006).
 26 Accordingly, it is the Defendants' position that the Court should require the Plaintiff to make a
 27

1 prima facie showing that the class action requirements are satisfied before allowing any class
2 action discovery.

3 If the Court determines that Plaintiff has standing, has stated a legally viable individual
4 claim, and has made a prima facie showing that discovery should be conducted regarding the
5 issue of class certification, then such discovery should be limited as follows: (1) 3 depositions
6 per side, with no deposition exceeding 7 hours absent good cause shown; (2) 10 interrogatories,
7 including subparts, per side; and (3) 30 requests for production of documents, including subparts,
8 per side.

9 Defendants also propose that the discovery period for the putative class be limited in time
10 to the four years prior to the filing of the Complaint (again, if the Court determines that
11 discovery regarding class certification is necessary). Although the Complaint provides no
12 relevant time period, the applicable statutes of limitations make four years a reasonable period
13 for discovery purposes. *See, e.g.*, Cal. Civ. Proc. Code §§ 337 and 338 (four year statute of
14 limitations for breach of contract actions and three year period for actions for injury to real
15 property); Cal. Civ. Code § 1783 (three year statute of limitations for breach of the Consumers
16 Legal Remedies Act); Cal. Bus. & Prof. Code § 17208 (four year limitations period for action
17 for breach of Business and Professions Code).

18 **9. Class Actions**

19 The parties have included class certification proceedings in the schedule submitted in
20 Paragraph 17.

21 **10. Related Cases**

22 There are no related cases pending before this Court or before another court or
23 administrative body.

24 **11. Relief**

25 *Plaintiff's Statement:* Plaintiffs seek compensatory, equitable, statutory and punitive
26 damages, plus costs and attorney fees, plus interest. Precise amounts are not capable of
27 determination at this time.

1 **16. Expedited Schedule**

2 Given the Defendants' position that class certification should be determined as a
3 threshold matter, it is too early to determine whether this case can be handled on an expedited
4 basis with streamlined procedures.

5 **17. Scheduling**

6 *Plaintiff's Proposed Schedule:*

7 Due to the nature of class action cases, the parties jointly propose limiting the scheduling
8 order through class certification.

9 Plaintiffs' disclosure of experts:	9/25/08
10 Plaintiffs' Expert Depositions:	10/31/08
11 Defendants' disclosure of experts:	10/31/08
12 Close of expert discovery:	11/30/08
13 Preliminary Discovery Completion:	12/30/08
14 Class Certification Motion:	01/15/09
15 Opposition to Class Motion:	02/15/09
16 Reply to Opposition:	03/01/09

17 *Defendants' Proposed Schedule:*

18 If the Plaintiff can demonstrate that she has standing and that she has pled a legally
19 sufficient claim on her own behalf, then it is the Defendants' position that class certification
20 should be decided first and a schedule for additional dates beyond that should be deferred until
21 after a decision on class certification. Further, due to the individual issues inherent in these cases
22 and the fact that courts have never certified any termite damage case as a class action, it is the
23 Defendants' position that the Court should require the Plaintiff to make a prima facie showing
24 that the class action requirements are satisfied before allowing any class action discovery. The
25 Defendants propose that briefing on the permissibility of class action discovery be completed by
26 May 15, 2008.
27
28

If the Court determines that Plaintiff has made a prima facie showing or that discovery should be conducted regarding the issue of class certification, then the Defendants propose the following class certification schedule:

Parties to serve written discovery:	6/15/08
Deadline for Plaintiff to make property available for inspection:	7/15/08
Deadline for deposition of Plaintiff on class certification issues:	8/15/08
Deadline for non-expert depositions:	9/15/08
Close of written discovery:	9/30/08
Plaintiff to make class expert disclosures:	10/15/08
Plaintiff to make class experts available for deposition:	11/15/08
Defendants to make class expert disclosures:	1/2/09
Defendants to make class experts available for deposition:	2/1/09
Plaintiff's motion for class certification:	3/15/09
Defendants' opposition to motion for class certification:	4/15/09
Plaintiff's reply brief in support of motion for class certification:	5/1/09
Ruling on motion for class certification:	6/1/09
Further case management conference:	7/1/09

18. Trial

Plaintiff's Statement: A jury trial has been demanded. The length of trial is expected to be four (4) to six (6) weeks at this time.

Defendants' Statement: If the case is not compelled to proceed to arbitration and proceeds in this Court, then the case will be tried to a jury. It is too early to reasonably predict the length of any trial, which will depend on whether the Court certifies a class. If class certification is denied, the trial on Plaintiff's claims should take four to five trial days. If a class is certified, Defendants anticipate that any trial would last several months, not including an indeterminate amount of time for mini-trials on individual issues.

19. **Disclosure Of Non-Party Interested Entities Or Persons**

Plaintiff's Statement: All California consumers who purchased subterranean (ground) termite services from Defendants.

Defendants' Statement: Defendants will file their Disclosure of Non-Party Interested Entities or Persons pursuant to Civil Local Rule 3-16 prior to the case management conference.

Respectfully submitted,

DATED: April 3, 2008

HOFFMAN & LAZEAR

/s/

H. Tim Hoffman, Esq.
One of the Attorneys for Plaintiff
BARBARA NEU

DATED: April 3, 2008

HINSHAW & CULBERTSON LLP

/s/

Christopher J. Borders, Esq.
Attorneys for Defendants
TERMINIX INTERNATIONAL, INC.,
THE TERMINIX INTERNATIONAL COMPANY
LIMITED PARTNERSHIP
(erroneously sued herein as The Terminix International Company),
THE SERVICEMASTER COMPANY,
SERVICEMASTER CONSUMER SERVICES, and
SERVICEMASTER CONSUMER SERVICES
LIMITED PARTNERSHIP

SO ORDERED.

Dated: _____

THE HONORABLE CLAUDIA WILKIN
DISTRICT COURT JUDGE
UNITED STATES DISTRICT COURT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

2969833v1 884739